MAY 29 2001 No. 00-878 (6)

Supreme Court, U.S.
FILED
MAY 29 2001
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

RICHARD L. MATHIAS, TERRY S. HARVILL, EDWARD C. HURLEY, RUTH K. KRETSCHMER and MARY FRANCES SQUIRES, in their official capacities as Commissioners of the Illinois Commerce Commission,

Petitioners,

v.

WORLDCOM TECHNOLOGIES, INC., ILLINOIS BELL TELEPHONE COMPANY d/b/a AMERITECH ILLINOIS, AT&T COMMUNICATIONS OF ILLINOIS, INC. and FOCAL COMMUNICATIONS CORP.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF OF *AMICUS CURIAE* PENNSYLVANIA PUBLIC UTILITY COMMISSION IN SUPPORT OF PETITIONERS ON THE MERITS

MARYANNE REYNOLDS MARTIN
Counsel of Record
BOHDAN R. PANKIW
FRANK B. WILMARTH
MATTHEW A. TOTINO
PENNSYLVANIA PUBLIC UTILITY COMMISSION
Commonwealth Keystone Building
400 North Street, 3rd Floor West
P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 787-5000

May 29, 2001

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

24 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICUS CURIAE*	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	4
I. FUNDAMENTALLY, THE SEVENTH CIRCUIT ERRED IN HOLDING THAT FEDERAL COURT REVIEW UNDER § 252 OF THE ACT IS EXCLUSIVE	4
II. THE SEVENTH CIRCUIT ERRED IN HOLDING THAT A STATE COMMISSION WAIVES THE STATE'S SOVEREIGN IMMUNITY WHEN IT APPLIES THE SUBSTANTIVE PROVISIONS OF § 252 OF THE ACT TO REGULATED ENTITIES	7
III. THE SEVENTH CIRCUIT ERRED IN ASSERTING JURISDICTION OVER THE INDIVIDUAL STATE COMMISSIONERS UNDER THE *EX PARTE YOUNG* DOCTRINE	14
CONCLUSION	17

TABLE OF AUTHORITIES

CASES	Page
Alden v. Maine, 527 U.S. 706 (1999)	14
AT&T Corp. v. Iowa Util. Bd., 525 U.S. 366 (1999)	16
Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985)	7
Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963)	14
Bell Atlantic—Pennsylvania, Inc. v. Pennsylvania Pub. Util. Comm'n, 763 A.2d 440 (Pa. Cmwlth. 2000) (en banc)	6
Bell Atlantic Maryland, Inc. v. MCI WorldCom, Inc., 240 F.3d 279 (4th Cir. 2001)	7
Bell Atlantic-Pennsylvania, Inc. v. Pennsylvania Pub. Util. Comm'n, No. 00-2620 (3rd Cir., filed Aug. 30, 2000)	1, 6
Bomer-Blanks Lumber Co., Inc. v. Oryx Energy Corp., 837 F. Supp. 769 (M.D. La. 1993)	15
C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Ok., ___ U.S. ___ (decided April 30, 2001) (2001 U.S. Lexis 3374)	9
Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962)	6
Chittister v. Dep't of Commun. and Econ. Dev., 226 F.3d 223 (3rd Cir. 2000)	8
College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd., 527 U.S. 666 (1999)	7, 9
Edelman v. Jordan, 415 U.S. 651 (1974)	7
El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473 (1999)	6
Ex parte Young, 209 U.S. 123 (1908)	*passim*

TABLE OF AUTHORITIES—Continued

	Page
Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264 (1981)	10, 11
Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997)	14, 15
Illinois Bell Tel. Co. v. WorldCom Tech., Inc., 179 F.3d 566, 570-571 (7th Cir. 1999), *cert. granted sub nom Mathias v. WorldCom Tech., Inc.*, (U.S. Mar. 5, 2001) (No. 00-878)	4
Litman v. George Mason Univ., 186 F.3d 544 (4th Cir. 1999), *cert. denied*, 528 U.S. 1181 (2000)	7
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)	5
MCI Telecom. Corp. v. Verizon Pennsylvania, Inc., No. 00-2257 (3rd Cir., filed July 28, 2000)	1
MCI Telecomms. Corp. v. Illinois Bell Tel. Co., 222 F.3d 323 (7th Cir. 2000), *cert. denied*, 2001 U.S. Lexis 898	3, 8
New Orleans Pub. Serv. Inc. v. New Orleans, 491 U.S. 350 (1989)	16
O'Shea v. Littleton, 414 U.S. 488 (1974)	14
Parden v. Terminal R. of Ala. Docks Dept., 377 U.S. 184 (1964)	9
Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984)	8, 15, 16
Pennsylvania Elec. Co. v. Pennsylvania Pub. Util. Comm'n, 544 Pa. 475, 677 A.2d 831 (1996)	6, 7
Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275 (1959)	10
Printz v. U.S., 521 U.S. 898 (1997)	13

TABLE OF AUTHORITIES—Continued

	Page
Ricci v. State Bd. of Law Examiners, 569 F.2d 782 (3d Cir. 1978)	15
Williams v. Taylor, 529 U.S. 420 (2000)	6
Younger v. Harris, 401 U.S. 37 (1971)	14
STATUTES	
1 Pa. C.S. § 2310	8
42 Pa. C.S. § 763	5
42 Pa. C.S. § 8522	8
66 Pa. C.S. §§ 101-3316	11
66 Pa. C.S. § 501(b)	11
66 Pa. C.S. § 508	11
66 Pa. C.S. § 1301	11
66 Pa. C.S. § 1501	11
66 Pa. C.S. § 3001	11
66 Pa. C.S. §§ 3001-3009	11
2 U.S.C. §§ 1501-1571	13
47 U.S.C. §§ 153(41)	1, 12
47 U.S.C. §§ 251-261	15
47 U.S.C. § 252	*passim*
47 U.S.C. § 252(b)(4)(C)	12
47 U.S.C. § 252(e)	1
47 U.S.C. § 252(e)(1)	12
47 U.S.C. § 252(e)(3)	15
47 U.S.C. § 252(e)(4)	4, 5
47 U.S.C. § 252(e)(5)	13
47 U.S.C. § 252(e)(6)	4, 5, 17
47 U.S.C. §§ 253(b)-(c)	16
47 U.S.C. § 254(f)	16
47 U.S.C. §§ 261(b)-(c)	16
47 U.S.C. § 271(d)(2)(B)	16
Kentucky Rev. Statutes, Ch. 278.410	6
Ohio Rev. Code Ann. §§ 4903.12 & 4903.13 (Baldwin 2000)	6

TABLE OF AUTHORITIES—Continued

CONSTITUTIONS	Page
Pennsylvania Const., Art. V, § 9	5
U.S. CONST. art. I, § 10	10
U.S. CONST. art. I, § 8, cl. 3	5
U.S. CONST. art. VI	12
U.S. CONST. amend. X	5
U.S. CONST. amend. XI	7

INTEREST OF THE *AMICUS CURIAE*

Amicus Curiae Pennsylvania Public Utility Commission (hereinafter "Pennsylvania Commission") submits this brief in support of Petitioners Richard L. Mathias *et al.*, pursuant to Supreme Court Rule 37. The Pennsylvania Commission has obtained the written consent of all parties to file this brief.[1]

The Pennsylvania Commission is an administrative agency of the Commonwealth of Pennsylvania. Under the laws of the Commonwealth of Pennsylvania, the Pennsylvania Commission has regulatory jurisdiction with respect to intrastate operations of telecommunications carriers. Accordingly, it is a "State commission" under section 252(e) of the Federal Telecommunications Act of 1996 (the Act).[2]

The issues in this case concern the scope of Federal court jurisdiction under section 252 of the Act. Respondents WorldCom and AT&T oppose the Illinois Commissioners' assertion of sovereign immunity in this case and their Pennsylvania counterparts oppose the Pennsylvania Commission and its commissioners on similar claims in the United States Court of Appeals for the Third Circuit. *Bell Atlantic-Pennsylvania, Inc. v. Pennsyl-vania Pub. Util. Comm'n*, No. 00-2620 (3rd Cir., filed Aug. 30, 2000); *MCI Telecom. Corp. v. Verizon Pennsylvania, Inc.*, No. 00-2257 (3rd Cir., filed July 28, 2000).[3] The questions accepted for disposition by

---

[1] No counsel for a party authored the brief in whole or in part and no persons other than the Pennsylvania Commission made a monetary contribution to the preparation of this brief.

[2] 47 U.S.C. § 252(e) (requiring State commission approval of interconnection agreements); 47 U.S.C. § 153(41) (defining "State commission" as "the commission, board, or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers.").

[3] On April 29, 2001, the Third Circuit's Clerk of Courts notified the parties that both Pennsylvania appeals have been tentatively listed on the merits for Thursday, June 21, 2001.

this Honorable Court are broad enough to materially impact the outcome of the two Pennsylvania appeals pending in the Third Circuit. This case is also the Court's first consideration of the application of the sovereign immunity doctrine to the Act. Thus, the Pennsylvania Commission has a vital interest in the disposition of this case.

SUMMARY OF THE ARGUMENT

The Pennsylvania Commission respectfully disagrees with the United States Court of Appeals for the Seventh Circuit on the issue of whether Federal jurisdiction under § 252(e)(6)[4] of the Act is exclusive when it exists. State court review under § 252(e)(6) should be recognized as appropriate when a State commission does not waive the State's sovereign immunity. Such State court review is guaranteed by the Constitution of the Commonwealth of Pennsylvania. Such review is available as of right before the Commonwealth Court of Pennsylvania, an intermediate appellate court within Pennsylvania's Unified Judicial System. Congress has no authority under the Act to interfere with Pennsylvania's system of judicial review.

The Pennsylvania Commission argues that the Act does not constitute "Congress's invitation to participate in implementing a Federal regulatory scheme."[5] The Act does not invite

---

[4] Section 252(e)(6) provides in pertinent part: "In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section." 47 U.S.C. § 252(e)(6).

[5] Here, the Pennsylvania Commission quotes one of three questions before the Court, namely "Whether a state commission's acceptance of Congress' invitation to participate in implementing a federal regulatory scheme that provides that state commission determinations are reviewable in federal court constitutes a waiver of Eleventh Amendment immunity."

participation; it mandates participation. State commissions "shall" do this, and "shall" do that. Neither monetary compensation nor opportunity to express a clear intent is provided for in the Act. Nevertheless, states like Pennsylvania share Congress's intent to open local telecommunications markets to the benefits of competition and, thus, have implemented the Act's substantive provisions. State commission cooperation in this regard, however, has its limits.

When the Pennsylvania Commission acts to approve a contract for interconnection between two telecommunications carriers, the commission is engaged in an "otherwise lawful activity" and does not voluntarily waive the Commonwealth's sovereign immunity to private party suit in Federal court. Correspondingly, the commission does not waive the Commonwealth's ability to provide for judicial review of commission orders. Even if a majority of the members of the commission intended to waive immunity and State judicial review, it is not at all certain that the commission could do so. All acts of the Pennsylvania Commission are defined in relation to the Pennsylvania constitution and statutes, including the enabling authority granted to the Pennsylvania Commission by the Commonwealth of Pennsylvania.

Contrary to the Seventh Circuit's view, State commissions like the Pennsylvania Commission are not "deputized federal regulators"[6] and they receive no gift or gratuity from the Federal government in consideration for participation in the Act's regulatory scheme. The theory that a State commission is "deputized" by the Federal government to exercise "federal regulatory authority" independent of the very State government that created the State commission is repugnant to our system of federalism.

Mathias v. WorldCom, 532 U.S. ___ (order entered March 5, 2001) (No. 00-878).

[6] *MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 344 (7th Cir. 2000), *cert. denied*, 2001 U.S. Lexis 898.

Similarly, the Pennsylvania Commission respectfully disagrees with the Seventh Circuit's application of the *Ex parte Young* doctrine [7] to allow Federal suit against individual members of a State commission without their consent merely for voting to approve, reject or enforce an interconnection agreement under section 252 of the Act. Even if the majority vote constitutes an error of law, such error is rectified by judicial review in State court and does not suffice to override the sovereign immunity of a State. State courts are perfectly competent to review actions of State commissions for compliance with State and Federal law. The rule in *Ex parte Young* also does not apply because the State is the real party in interest and the constitutional doctrine of sovereign immunity bars suit against State officials when the State is the real party in interest.

ARGUMENT

I. FUNDAMENTALLY, THE SEVENTH CIRCUIT ERRED IN HOLDING THAT FEDERAL COURT REVIEW UNDER § 252 OF THE ACT IS EXCLUSIVE.

The Seventh Circuit read § 252(e)(4) of the Act in conjunction with § 252(e)(6) and concluded that Federal court review is exclusive when it exists. *Illinois Bell Tel. Co. v. WorldCom Tech., Inc.*, 179 F.3d 566, 570-571 (7th Cir. 1999), *cert. granted sub nom Mathias v. WorldCom Tech., Inc.*, (U.S. Mar. 5, 2001) (No. 00-878). Section 252(e)(4) provides in relevant part: "No State court shall have jurisdiction to review the action of a State commission." 47 U.S.C. § 252(e)(4). The harm caused by § 252(e)(4) is at the heart of this case as well as the two Pennsylvania cases

[7] *Ex parte Young*, 209 U.S. 123 (1908) (a judicially-created equitable remedy that permits a Federal court review against a state official where such remedy is necessary to protect the supremacy of Federal law).

pending in the Third Circuit and similar cases brought by other State commissions.

The Seventh Circuit's analysis is flawed by its reliance upon § 252(e)(4). Congress acted outside the scope of its Commerce Clause powers [8] when it prohibited State court review of State commission decisions. Congress has no authority under the Commerce Clause to sever the relationship between a State court and a State commission. Having no authority, Congress is prohibited by the Tenth Amendment from requiring State commission decisions to be reviewed in Federal court.[9] A State's ability to provide for State court review of State commission decisions remains in tact and unassailable; the Act's prohibition of State court review is unconstitutional and unenforceable. Accordingly, Federal court review under § 252(e)(6) of the Act is not exclusive when it exists.

Moreover, under the Constitution and statutes of the Commonwealth of Pennsylvania, judicial review of the Pennsylvania Commission's orders is available as of right in the Commonwealth Court of Pennsylvania. Pennsylvania Const., Art. V, § 9 (guaranteeing right of appeal from a state administrative agency to the appropriate State court); 42 Pa. C.S. § 763 (providing for review of agency orders in the Commonwealth Court of Pennsylvania).[10] Already, the

[8] There is no dispute that the Act was passed pursuant to Congress's powers under the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3.

[9] U.S. CONST. amend. X. The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." There should be no dispute that "the constitution is superior to any ordinary act of the legislature[;] the constitution, and not such ordinary act, must govern the case to which they both apply." *Marbury v. Madison*, 5 U.S. (1-Cranch) 137, 178 (1803).

[10] State laws routinely provide for appeals from State commission decisions to be filed directly and exclusively against State commissions.

Pennsylvania courts have implicitly recognized this right as extending to judicial review of Federal questions under § 252 of the Act. This decision was reached in *Bell Atlantic—Pennsylvania, Inc. v. Pennsylvania Pub. Util. Comm'n*, 763 A.2d 440 (Pa. Cmwlth. 2000) (*en banc*) (disposing of Federal law questions having a direct nexus to § 252 of the Act that were presented to the court by MCI and others telecommunications carriers).[11]

It is well established that State courts are presumed competent to review lower tribunal determinations for compliance with Federal and State law. *Williams v. Taylor*, 529 U.S. 420, 120 S. Ct. 1479, 1491 (2000) (stating that State courts should have "their rightful opportunity to adjudicate federal rights"); *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 486 n.7 (1999) (noting that State courts "can and do decide questions of federal law"); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507 (1962) (acknowledging "the premise that nothing in the concept of our federal system prevents State courts from enforcing rights created by federal law"); *Pennsylvania Elec. Co. v. Pennsylvania Pub. Util. Comm'n*,

---

For example, *see* Ohio Rev. Code Ann. §§ 4903.12 & 4903.13 (Baldwin 2000) (Supreme Court of Ohio has exclusive jurisdiction to review orders of Public Utilities Commission of Ohio); Kentucky Rev. Statutes, Ch. 278.410 (providing that Franklin Circuit Court is the exclusive forum for review of Kentucky Public Service Commission orders).

[11] The *Bell Atlantic* case decided by the Commonwealth Court and the *Bell Atlantic* case pending in the Third Circuit at No. 00-2620 are related. Both cases arise from the same Pennsylvania Commission order entered Sep. 30, 1999, and raise identical Federal law issues. Parties made both courts aware of the other case; no stay of the State court proceeding was requested. The Commonwealth Court was the first court to decide the issues. Accordingly, in the event that the Third Circuit rejects the commission's claim of sovereign immunity, the commission has asked the Third Circuit to give preclusive effect to the Commonwealth Court's judgment on the merits. *Brief for Appellants, Bell Atlantic-Pa., Inc. v. Pennsylvania Pub. Util. Comm'n*, (3rd Cir., brief filed Dec. 11, 2000) (No. 00-2620).

544 Pa. 475, 677 A.2d 831, 832 (1996) (reviewing State commission determination for compliance with Federal law). In cases under section 252 of the Act, there is no firm basis to depart from these basic tenets of law.

II. THE SEVENTH CIRCUIT ERRED IN HOLDING THAT A STATE COMMISSION WAIVES THE STATE'S SOVEREIGN IMMUNITY WHEN IT APPLIES THE SUBSTANTIVE PROVISIONS OF § 252 OF THE ACT TO REGULATED ENTITIES.

The constitutional principle of State sovereign immunity plays a vital role in our constitutional structure. *Bell Atlantic Maryland, Inc. v. MCI WorldCom, Inc.*, 240 F.3d 279, 288 (4th Cir. 2001) (citing cases). The States' sovereignity, protected by the Eleventh Amendment,[12] precludes private suits against non-consenting States in Federal court. *Id.* However, nothing in the federal structure prohibits a State from voluntarily waiving its sovereign immunity from private party suit by explicitly consenting to such suit. *Id.* at 289. The test for determining whether a State has waived its immunity from Federal court jurisdiction is a stringent one. *Id.*; *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985); *see also College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 675 (1999); *Edelman v. Jordan*, 415 U.S. 651, 673 (1974); *Litman v. George Mason Univ.*, 186 F.3d 544, 550 (4th Cir. 1999), *cert. denied*, 528 U.S. 1181 (2000). A Federal court may find a State to have waived its immunity only if the State directly and affirmatively waives its Eleventh Amendment immunity. *Bell Atlantic Maryland*, 240 F.3d at 289; *Atascadero*, 473 U.S. at 241.

A threshold question in this and similar cases is whether the State commission is authorized to waive a State's

---

[12] U.S. CONST. amend XI.

immunity. In Pennsylvania, "only a command of the General Assembly is sufficient under Pennsylvania law to waive the Commonwealth's immunity." *Chittister v. Dep't of Commun. and Econ. Dev.*, 226 F.3d 223, 227 (3rd Cir. 2000). The Pennsylvania Commission lacks express authorization to waive immunity. 1 Pa.C.S. § 2310.[13] Waiver is authorized only in a handful of circumstances, not including administrative action pursuant to the Federal Telecommunications Act. 42 Pa. C.S. § 8522.[14] As this Court has recognized, absent express authorization, a State agency cannot waive a State's immunity. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 103 n. 12 (1984). Therefore, Federal courts cannot assume a State commission has authority to waive a State's sovereign immunity merely because the State commission regulates the intrastate operations of telecommunications carriers.

The Seventh Circuit avoided the question of the Illinois Commission's authority. It held that a State itself waives immunity if it has not "taken any steps to forbid their respective commissions from exercising the authority granted to them by Congress." *MCI Telcomm. Corp.*, 222 F.3d at 344 n. 10. In other words, the Seventh Circuit has held that

---

[13] Pursuant to 1 Pa. C.S. § 2310, it is the intent of the General Assembly that the Commonwealth of Pennsylvania, and its officials and employees acting within the scope of their duties continue to enjoy sovereign immunity and official immunity and remain immune from suit except as the General Assembly shall specifically waive the immunity. Section 2310 further provides: "When the General Assembly specifically waives sovereign immunity, a claim against the Commonwealth and its officials and employees shall be brought only in such manner and in such courts and in such cases as directed by the provisions of Title 42 (relating to judiciary and judicial procedure) or 62 (relating to procurement) unless otherwise specifically authorized by statute."

[14] 42 Pa. C.S. § 8522 sets forth specific exceptions to sovereign immunity and does not include actions under the Federal Telecommunications Act.

waiver can be found when a State does nothing. This is error. A "failure-to-forbid" standard is tantamount to revival of the discredited "constructive waiver" doctrine. "[T]he constructive-waiver experiment of *Parden [v. Terminal R. of Ala. Docks Dept.*, 377 U.S. 184 (1964)] was ill conceived, and [there is] no merit is attempting to salvage any remnant of it." *College Savings Bank*, 527 U.S. 666, 119 S.Ct. at 2228.

The recent case of *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Ok.*, ___ U.S. ___ (decided April 30, 2001) (2001 U.S. Lexis 3374) is instructive on what character of action is required to effect waiver. The Court issued a unanimous decision in *Citizens Band* on the question of whether immunity from private suit in a State court was waived with the requisite clarity by an Indian Tribe. After reviewing the facts, the Court held that the Tribe had waived its immunity with the requisite clarity.

In *Citizen Band*, the Tribe tendered a form construction contract to C&L Enterprises for construction of a roof. The Tribe inserted details not set forth in the form contract, including the selection of Oklahoma law to govern the contract. Applicable Oklahoma law provided for arbitration of contractual disputes with enforcement in any State court of competent jurisdiction. The Tribe signed the contract. After execution of the contract, but before C&L commenced performance, the Tribe retained another company to install the roof. C&L, claiming that the Tribe had dishonored the contract, submitted an arbitration demand. The Tribe asserted sovereign immunity and took the position that "no court, on earth or even on the moon" had jurisdiction over the contract.

The Court looked for and found actions taken by the Tribe to effect the waiver. The Tribe "proposed" or "tendered" a contract, "inserted" details not set forth in the form contract, "selected" Oklahoma law to govern the contract, and "signed" the contract accepted by C&L Enterprises. Each act was unambiguous and volitional. While the Tribe made

unambiguous, volitional acts to effect waiver, the same cannot be said of State commissions under the Act.

Another instructive case is *Petty v. Tennessee-Missiouri Bridge Commission*, 359 U.S. 275 (1959). In *Petty*, States acted in a similar unambiguous volitional fashion to effect waiver. States entered into a compact with an agreed-on suability provision, providing that the joint State commission could "be sued in its own name." The States submitted the compact to Congress for approval.[15] Accordingly, there was express waiver. Again, no such waiver has occurred here.

In the instant case, the Court must look for and analyze what, if any, unambiguous volitional acts form the basis of the alleged waiver of a State's immunity. Opponents contend that State commissions in Illinois, Pennsylvania and other States waive immunity by "accepting" an invitation, gift or gratuity from Congress. This acceptance manifests itself, the theory goes, when the commission issues an order resolving disputes between regulated companies or approving contracts presented by regulated companies. The Pennsylvania Commission submits that issuance of orders to regulated telecommunications carriers is an ordinary activity and does not express an intent to waive immunity.

At the very least, State commission issuance of orders pursuant to the mandate of the Act is ambiguous and lacks the requisite clarity to constitute waiver. Ambiguity exists because Congress did not offer, and State commissions did not receive, any compensation in return for issuance of orders. Congress did not ask for, and State commissions did not submit for approval, any proposed program for issuance of orders under the Act. In these regards, the Act is not analogous to the scheme of "federal cooperatism" approved in *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*,

[15] *See* U.S. CONST. art. I, § 10 (prohibiting formation of an interstate compact absent Congressional approval).

452 U.S. 264, 271 (1981) (noting that Congress "provid[ed] for financial reimbursements to States" to encourage participation, and required the States to "submit a proposed permanent program to the [Federal Government]" for approval as a predicate for participation). Unlike *Hodel*, the Telecommunications Act provides for no financial reimbursements and requires neither program submission nor Federal approval to participate.

Moreover, in Pennsylvania, every measure of State commission authority contemplated by the Act is duplicative of a right and responsibility the Pennsylvania Commission already possessed under pre-existing Pennsylvania law.[16] For example, in 1993, the Pennsylvania General Assembly amended the Public Utility Code to add "Chapter 30," 66 Pa. C.S. §§ 3001-3009, thereby ending the old monopoly system for telecommunications carriers and expressing the legislative intent and the Pennsylvania Commission's obligation to introduce the benefits of competition into the local telecommunications markets throughout Pennsylvania.

[16] Under the laws of the Commonwealth of Pennsylvania, the Pennsylvania Commission is charged with the responsibility of regulating jurisdictional public utilities, including telecommunications carriers. 66 Pa. C.S. §§ 101-3316. The rights and responsibilities of the Pennsylvania Commission include the following: the general administrative power and authority to supervise and regulate all public utilities doing business in Pennsylvania, 66 Pa. C.S. § 501(b); the power to vary, reform and revise contracts entered into by a public utility that concern the public interest and general well-being of the Commonwealth of Pennsylvania, 66 Pa. C.S. § 508; the power to fix just and reasonable rates for the services provided by telecommunications utilities to customers, 66 Pa. C.S. § 1301; the power to require telecommunications utilities to provide adequate and reliable service to customers, 66 Pa. C.S. § 1501; and, the responsibility to implement the telecommunications policy of the Commonwealth of Pennsylvania as declared by the General Assembly. 66 Pa. C.S. § 3001 (West Supp. 1998) (declaration of policy).

The Act bestowed no new authority on the Pennsylvania Commission nor necessarily upon other State commissions. There is no indication that Congress intended to grant State commissions authority such commissions did not already possess under applicable State law. In fact, Congress itself defined State commissions by the authority granted in the respective States. 47 U.S.C. § 153(41) (characterizing a "State commission" as a commission constituted under the laws of a State). Even when advancing its litigation position, the Federal Government does not suggest that the Act provides State commissions with what would be truly new authority such as regulating inter-state operations or acting outside the geographical boundaries of their State. Thus, the issuance of State commission orders approving, rejecting, or enforcing contracts between jurisdictional carriers is an otherwise ordinary activity and does not constitute an express waiver of the State's immunity.

By regulating in a manner consistent with the substantive provisions of the Act, but asserting sovereign immunity and supporting State court review, the Pennsylvania Commission remains faithful to both the Pennsylvania Public Utility Code, the lawful provisions of the Act, and the Supremacy Clause of the United States Constitution.[17] In so acting, it has received neither "gift" nor "gratuity" from the Federal Government.

If the Act is not an invitation to accept the gift or gratuity of participating, then what is it? A fair reading reveals that the Act is a mandate. The Act provides that State commissions "shall approve or reject" interconnection agreements. 47 U.S.C. § 252(e)(1). It provides that State commissions "shall resolve" disputed issues between carriers. 47 U.S.C. § 252(b)(4)(C). These provisions are not conditional.[18]

---

[17] U.S. CONST. art. VI (prohibiting a State commission from regulating in a manner that conflicts with Federal law).

[18] The Act was passed into law just prior to full implementation of the Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48, 48, *codified at* 2 U.S.C. §§ 1501-1571 (Supp. II 1996) (UMRA). It is the commission's understanding that the Act never underwent an UMRA analysis.

When viewed in the light of mandate, it is clear that Congress even contemplated a remedy for failure to act as required. Section 252(e)(5) authorizes the Federal Communications Commission to preempt State commission jurisdiction if the State commission "fails to act to carry out its responsibility." Thus, if the Pennsylvania Commission does not adhere to the Act, it risks sanction by FCC-preemption under § 252(e)(5) and the loss of ability to perform its pre-existing rights and responsibilities.

Although the Pennsylvania Commission cannot be forced to perform acts for Congress, *Printz v. U.S.*, 521 U.S. 898, 117 S.Ct. 2365, 2382 (1997), it can choose to voluntarily cooperate with Congress. This is what the Pennsylvania Commission and other State commissions have done. Such cooperation does not equate to agreement to be "deputized" as a Federal regulator subject to Federal court review. First, the Pennsylvania Commission has no express authority to waive the Commonwealth of Pennsylvania's immunity. Second, the Pennsylvania Commission, as a State administrative agency, cannot unilaterally agree to have its orders reviewed in Federal court to the exclusion of State courts. Moreover, Congress has no authority to pre-empt State laws providing for State court review of State administrative agency decisions.

A forced waiver of Pennsylvania's immunity from private party suit in Federal court, and an alleged disenfranchisement of the Pennsylvania Judiciary, one of the equal and independent branches of Pennsylvania Government, is not consistent with the law or our nation's scheme of federalism. "Although the Constitution grants broad powers to Congress, our federalism requires that Congress treat the States in a

manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation." *Alden v. Maine*, 527 U.S. 706, 119 S.Ct. 2240, 2263 (1999). Accordingly, State commissions do not waive a State's immunity or other applicable privileges of the sovereign when they apply the substantive provisions of Section 252 of the Act.

III. THE SEVENTH CIRCUIT ERRED IN ASSERTING JURISDICTION OVER THE INDIVIDUAL STATE COMMISSIONERS UNDER THE *EX PARTE YOUNG* DOCTRINE

The judicially created *Ex parte Young* doctrine is also subject to a State's rights as a sovereign. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997). A State's rights are violated if individual commissioners are subject to Federal court jurisdiction in the circumstances of this case, namely circumstances where private parties seek ordinary appellate-style review of a State commission decision, especially where any aggrieved party has a right to immediate State court review.[19] Cf. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 68-71 (1963) (relying on doctrine of *Ex parte Young* to restrain morality commission where commission's decisions bore a heavy presumption against constitutional validity and where commission did not operate "under judicial superintendence.") The Court should reject the Seventh Circuit's holding that jurisdiction is proper under the doctrine of *Ex parte Young*.

---

[19] Essentially, the *Ex parte Young* doctrine is a form of equitable relief. It is well established that courts of equity should not act when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief. *O'Shea v. Littleton*, 414 U.S. 488, 499 (1974); *Younger v. Harris*, 401 U.S. 37, 43-44 (1971). In the instant case, the party complaining about the State commission action has an adequate remedy at law—State court review. There is no apparent irreparable injury at play. Therefore, an equitable remedy need not be applied.

The doctrine does not apply because the State commission is the real party in interest, consistent with both Federal and State law.[20] It is the State commission, not individual commissioners, which defends the commission's order on judicial review.[21] Indeed, the complainant may not have been "aggrieved" by all commissioners depending on how the individual commissioner voted. "The Eleventh Amendment bars a suit against State officials when 'the state is the real party in interest.'" *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984). *See* U.S. Const. amend. XI. "When suit is commenced against state officials, even if they are named and served as individuals, the State itself will have a continuing interest in the litigation whenever state policies or procedures are at stake." *Coeur d'Alene Tribe*, 521 U.S. at 269. The general rule is that a suit brought against State officials is a suit against the sovereign if the judgment sought would interfere with the public administration or restrain the State Government from acting. *Pennhurst*, 465 U.S. at 101 n.11.

The plain language of Part II of the Act[22] reveals Congressional recognition and preservation of State interests. *See*, for example, 47 U.S.C. § 252(e)(3) (preserving a State commission's authority to establish and enforce requirements

---

[20] Federal courts have held State agencies to be the only proper party in an action challenging that agency's order. *See, e.g., Ricci v. State Bd. of Law Examiners*, 569 F.2d 782, 784 (3d Cir. 1978) (Pennsylvania Supreme Court was indispensable party in proceeding to invalidate its rules); *Bomer-Blanks Lumber Co., Inc. v. Oryx Energy Corp.*, 837 F. Supp. 769, 770 (M.D. La. 1993) (collateral attack on agency's order made agency an indispensable party).

[21] In Pennsylvania, individual commissioners have no authority to bind the commission, except in public emergency situations not relevant to this case. A majority vote of the commissioners at public meeting is required for official Pennsylvania commission action.

[22] Development of Competitive Markets, 47 U.S.C. §§ 251-261 (West 2000).

of State law in its review of an interconnection agreement), §§ 253(b)-(c) (preserving State authority to, *inter alia*, impose requirements necessary to protect the public safety and welfare and to manage public rights-of-way), § 254(f) (preserving State authority to advance universal service in that State), and §§ 261(b)-(c) (preserving generally existing State regulations and additional state requirements that are not inconsistent with the Act). *See also* 47 U.S.C. § 271(d)(2)(B) (requiring FCC consultation with State commission on special provisions concerning Bell Operating Companies). Moreover, the establishment of rates is a matter particularly reserved for States. *AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366, 384 (1999). A State commission's interest goes beyond a utility's narrow business interest to the broad public interest. Indeed, this Court has recognized that the regulation of utilities "is one of the most important of the functions traditionally associated with the police power of the states." *New Orleans Pub. Serv. Inc. v. New Orleans*, 491 U.S. 350, 365 (1989).

Here, the Seventh Circuit has interfered with the Illinois Commission's regulation of local telecommunications markets, thus, interfering with public administration or restraining the State Government from acting. A claim of error in the official's exercise of delegated power is an insufficient basis for the suit to be allowed as an exception from the constitutional doctrine of sovereign immunity. *See Pennhurst*, 465 U.S. 89. The Seventh Circuit seeks to extend *Ex parte Young* to provide a substitute for ordinary judicial review of agency decisions Congress "invited," if not directed, the State commission to make. This extension of *Ex parte Young* should be rejected by this Court.

CONCLUSION

Section 252(e)(6) of the Act grants jurisdiction to Federal district courts to review certain actions taken by a State commission. *Amicus Curiae* Pennsylvania Commission takes no position on whether it was lawful for Congress to confer such jurisdiction on Federal district courts. Assuming the grant of jurisdiction was lawful, the Pennsylvania Commission submits that Federal courts cannot assert their jurisdiction to review a State commission's actions under § 252 of the Act absent party participation by the State commission and concomitant voluntary waiver of the State's sovereign immunity. Mere action to approve, reject, or enforce contracts between telecommunication carriers is insufficient to constitute the requisite voluntary, unequivocal waiver of the State's sovereign immunity from private party suit in Federal court. In this case, the requisite waiver is lacking. The subject private suit is also not authorized by the doctrine of *Ex parte Young*.

The challenge of this case is to balance the legitimate Congressional policy goals with the legitimate sovereign interest of States. The Pennsylvania Commission submits that the proper balance is to hold that a State commission like the Pennsylvania Commission is free to act in cooperation with the Federal government to implement the substantive pro-competitive provisions of the Act without necessarily simultaneously waiving a State's sovereign immunity. An important element in this position is the availability of State court review for all decisions of the State commission consistent with State judicial review provisions guaranteed by State constitution or statute.

Accordingly, the Court should grant the Writ of Certiorari and reverse the Seventh Circuit's jurisdictional holdings.

Respectfully submitted,

MARYANNE REYNOLDS MARTIN
Counsel of Record
BOHDAN R. PANKIW
FRANK B. WILMARTH
MATTHEW A. TOTINO
PENNSYLVANIA PUBLIC UTILITY COMMISSION
Commonwealth Keystone Building
400 North Street, 3rd Floor West
P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 787-5000

May 29, 2001